Neutral Citation Number: [2021] EWCA Civ 1174

Case No: B4/2021/0669 and 1043

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
HHJ Margaret de Haas QC
LV19C03747

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE NUGEE

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF YW (A CHILD) (ADEQUACY OF REASONS)

Between :

A MOTHER (1)	**Appellants**
A FATHER (2)	
- and -	
LOCAL AUTHORITY A (1)	**Respondents**
YW (by her children's guardian) (2)	
NA (3)	
SA (4)	
LOCAL AUTHORITY B (5)	
SN (6)	

Cleo Perry QC and Sorour Bassiri-Dezfouli (instructed by **PACE Solicitors**) for the **First Appellant**
Mark Senior (instructed by **MSB Solicitors**) for the **Second Appellant**
Lorraine Cavanagh QC and Jacqueline Whelan (instructed by **Local Authority Solicitor**) for the **First Respondent**
Celestine Greenwood (instructed by **Morecrofts LLP**) for the **Second Respondent**
Kirstin Beswick (instructed by **Duncan Lewis**) for the **Third Respondent**
Ian Haselhurst (instructed by **Brown Turner Ross**) for the **Fourth Respondent**
Rhian Livesley (instructed by **Local authority Solicitor**) for the **Fifth Respondent**
Lisa Edmunds (instructed by **Broudie Jackson Canter**) for the **Sixth Respondent**

Hearing date : 30 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 30 July 2021

LORD JUSTICE BAKER :

1. In this case the Court is considering separate appeals by the parents of a child, YW, born in December 2016, against findings made in care proceedings.

Background

2. For the purposes of the appeal, it is unnecessary to set out the whole background of the case. In order to illustrate the issues arising on the appeal, however, it is necessary to describe in outline the history of YW's admission to hospital on 1 November 2019. In this case, the judge did not set out the chronology in the judgment save in very brief terms. What follows, therefore, is drawn largely from two helpful and clear chronologies prepared for the hearing below by Ms Celestine Greenwood, counsel for the child.

3. The child's mother is Polish. The father came originally from Pakistan. In October 2019, the mother was living with YW in the north west of England, whereas the father was living in Austria. The events of 31 October and the following days additionally involve three other adults and two children, namely a man hereafter referred to as NA, with whom the mother was having some sort of relationship, the details of which are unclear, his child KA, born December 2015, a female friend of NA's hereafter referred to as SA, her daughter MS, born June 2016, and NA's nephew SN, then aged 25.

4. Prior to 31 October, the mother and YW had not come to the attention of the local authority for the area where they lived (hereafter referred to as "Local Authority A" for reasons that will become apparent below). It was subsequently alleged, however, that she led a chaotic and itinerant lifestyle, that she misused drugs and alcohol and had a history of self-harming. There were concerns, which emerged in the course of the subsequent investigation, that the mother and NA were engaged in human trafficking and that the mother had entered into sham marriages.

5. At 9.30am on 31 October, the mother departed from Manchester Airport on a flight to Antalya in Turkey, arriving at 4.30pm local time. At 11.45pm local time that evening, she departed Antalya on a flight back to the UK, arriving at Birmingham Airport at 1.30 in the morning of 1 November.

6. At 5.30am that morning, YW was registered as arriving at the emergency department of the hospital in her home town in the north west of England. At 6.38am she was seen by a doctor. Also present were the mother and NA, who was introduced as a friend. The history given was that YW had sustained a head injury at about 2 to 3pm on the day before, 31 October. The doctor was told that the mother and YW were living temporarily with NA but that NA was not in the house at the time of the incident. The mother had been in the kitchen with her friend, SA, while YW was playing with SA's daughter, MS, and NA's son, KA. The mother heard a bang and crying and went out to find YW lying at the bottom of the stairs. The mother said she thought YW had fallen down the stairs but was not sure what had happened. YW had cried but recovered quickly and carried on playing with the other children. The only injury seen was a small bruise above the left eyelid. There were no other concerns and YW went to bed at about 9pm. At about 5am the following morning, the mother had checked YW, noticed that the bruise had increased significantly, and had therefore brought her to hospital.

7. On examination, the doctor noted that YW seemed cheerful and was playing with toys. She had a large bruise and swelling over the left forehead extending to under the right eye and behind the left ear. The left eyelid was bruised and swollen and the eye was completely closed. The doctor noted that there were several safeguarding concerns – the delayed presentation, the fact that the injury seemed inconsistent with the suggested mechanism, and the fact that the household was already known to social services. At 7.25am, YW was seen by a consultant in the emergency department. The same history was given. The consultant thought that there was a high likelihood that this was a non-accidental injury. He ordered various tests including a CT scan and notified social services. The CT scan revealed no fracture nor any acute intracranial haemorrhage.

8. At 12.16 that afternoon, the mother's brother-in-law called the local police asking for a welfare check on YW. He told them that the mother had sent a photo of YW with a black eye that morning. He added that the mother was a drug addict and an habitual liar. In response, the police visited the property at 12.45pm where they spoke to SA. She said that she had been at the house on the previous day, that the three children had been playing upstairs, that she had heard a crash and went upstairs where she found YW crying. Later the mother had checked the child, found her to have a black eye, and had taken her to hospital.

9. At 1.54pm, YW was reviewed by an ENT specialist in the presence of the mother who gave a shorter version of the account she had given earlier – that YW had fallen down the stairs. On 2.08pm, she was seen by the two police officers who had earlier visited the house and spoken to SA. When asked by the officers about what had happened, however, the mother gave a different account. She said she had been out of the country when YW had been injured. She had flown to Turkey but because she had forgotten her passport she had been sent back to the UK, arriving at Birmingham that morning. NA had met her at the airport and told her on the way home that YW had suffered a black eye falling down the stairs. When she arrived home, she checked the child, and when she saw the black eye, she brought her to hospital.

10. At 3.11pm, YW, still in the emergency department, was seen by a paediatrician in the presence of the mother who told her that YW had fallen down stairs the day before. The mother said that she had not been at home at the time and was not sure how it had happened. YW was then referred to the local child protection medical centre where she was examined again by a consultant paediatrician, Dr SM. The mother and NA were present and provided the history. The mother said that the day before, her friend SA and her daughter had come round for dinner, that they were in the kitchen while the children were playing upstairs, that she heard a bang and crying, went out and found YW lying at the bottom of the stairs on the tiled floor crying. She comforted her and the child stopped crying. There were no injuries and YW continued playing with the other children. YW was asleep by 9.30pm. When the mother checked her at about 3am, she saw the child with "much swelling and reddish". At that point, she had woken NA. His account was that he had arrived home at about 2.30 to 3pm. YW was playing. He asked his son KA what had happened, and KA said "baby fell down from bike". At 9pm, he had noticed a small amount of bruising to YW's left eye and took a photograph. When awoken by the mother, he panicked and could not remember what happened next other than they brought YW to hospital. Dr SM examined the child and noted the bruising and swelling seen by the other doctors. It was her opinion that YW's injury was attributable to blunt force trauma, that she could not say whether it was caused

accidentally or not, that it was an unusual pattern for a fall down stairs, and that in the absence of a plausible history of an accident the injury may have been inflicted.

11. At 3.55pm, NA returned to the hospital accompanied by KA. He was seen by the two police officers. He showed them a photograph on his phone taken the night before. The officers noted that the child was shown in bed with a black eye. NA was cautioned and arrested on suspicion of assault contrary to s.47 of the Offences against the Person Act and for human trafficking and immigration offences, and taken to the police station. At 11.24 that evening, NA was interviewed under caution. He said that on the morning of 31 October, he had taken the mother to Manchester Airport where she had a 9am flight. She was going to Cyprus but he did not know the purpose of her trip. While he was away, the children YW and KA were looked after by his nephew, SN, who had stayed until 8 or 9am. While he was travelling back from the airport, SA called and asked if she could come over. At about 10am, she and MS arrived. While NA and SA had been in the living room, KA was playing on a bicycle and YW on what was described as a scooter type bike. While they were playing, KA had ridden his bike very fast, hit YW and she fell down, hitting her head on KA's bike. NA told the police that he didn't believe this caused the injury. Later he went to the shop and when he came back YW seemed to be behaving differently. The children carried on playing and later he had noticed redness on YW's scalp. When they put YW to bed, SA had given her some Nurofen and he noticed a red swelling on her head which he photographed on his phone. He was concerned but SA said they should wait until the mother returned. At 10pm, he had left to collect the mother from Birmingham, leaving SA looking after the three children. On the way back, he told the mother about the injury. When they arrived home, the mother had a cigarette and they took YW to hospital. SA had discouraged him from calling an ambulance and had come up with the idea of saying that YW had fallen down stairs while she and the mother had been cooking. He went along with this because he is afraid of social services.

12. At 5.30pm, the mother was interviewed by a social worker and a police officer as part of the s.47 investigation. She told them that she had initially lied about what had happened. In fact, she was out of the country when the incident happened. NA had arranged for her to fly to North Cyprus with fake documents in order to marry his cousin. She had been stopped in Turkey and returned to the UK because she did not have the correct paperwork to travel on to Cyprus. She was collected from the airport by NA who had told her that YW had been hurt but he advised her not to go to hospital as social services would probably get involved and that might result in the child being taken away. When she arrived home and saw the injury, however, she insisted on taking her to hospital. She said she was convinced that NA had caused the injury. At the hospital, KA had said "the bike – Dad did it". She said that NA was dangerous, with lots of identities and contacts, and that he had a firearm.

13. Later that evening, YW was placed under a police protection order. On the evening of the next day, 2 November, NA contacted the police saying that the mother was refusing to leave his property. He complained about her behaviour.

14. On 5 November, SA was interviewed by a social worker. She said that she had gone to NA's home on 31 October, and while MS and YW were playing with an electric bike there was an incident and YW had fallen off. She was comforted and then continued playing. At 3.30pm, SA heard a bang and saw that YW had fallen down. Again she consoled her. There was no sign of injury. When she and NA put YW to bed at about

6pm, however, she noticed that her head had started to swell. NA had contacted the mother who was out of the country. She said she would come straight home. When the mother arrived, she took YW straight to hospital. She apologised for lying about the mother being in the house when the incident occurred. She said that she had been told to lie by NA who had been concerned that KA would be taken away.

15. On 6 November, SA was interviewed by a police officer under caution. She said that she had arrived at NA's house at about 1pm on 31 October. YW was there and NA said that her parents had gone to Birmingham. KA was riding a bicycle, and MS and YW were in a little electric car. KA had ridden his bike into the car and YW had fallen out of the car onto the floor. She had cried for a few seconds but there were no signs of injury and she carried on playing. NA went out to the shop for a few minutes and before going noticed swelling on YW's head. The swelling got larger and SA said they should take YW to the doctor and should contact her parents. At that point, NA told her that the mother had gone to Cyprus. When they put YW to bed, NA had taken a photograph of her head. SA had not been happy about being left alone with the children when NA collected the mother, but NA told her to keep checking YW. When NA returned home with the mother, SA was woken by NA and told not to mention the mother being away or they would all be in trouble. He suggested saying that YW fell down the stairs. NA and the mother then took YW to hospital and she stayed with the other children.

16. Following the investigation, separate care proceedings were started by Local Authority A in respect of YW and KA and by the local authority for the area where SA lives ("Local Authority B"), in respect of her child MS. All three children were made subject to interim care orders, although MS remained in the care of her mother SA in a mother and baby foster placement. This Court has not been given details of any of the interim orders made in the proceedings, but after very considerable delay a fact-finding hearing was listed in the proceedings concerning YW. In addition to YW's parents, who were separately represented, and the child, who was represented by a guardian, NA, SA, Local Authority B and SN (NA's nephew) were all joined as respondents to the proceedings, making a total of eight parties.

17. All three adults involved in the incident on 31 October signed statements in the YW proceedings. It is unnecessary to set out the accounts they recorded in the statements in any detail. All three gave accounts that were in many respects (though not completely) the same as they had given to the police. It is unnecessary for the purposes of this appeal to analyse the inconsistencies any further. Suffice it to say that in their statements all three continued to maintain that the mother had not been present in the house during the day on 31 October; the mother maintained that she had flown to Turkey intending to go on to Cyprus but had been turned back; NA and SA continued to say that there had been an incident when KA had driven his bike into YW's toy car and she had fallen; NA and SA continued to say that YW's head had become increasingly swollen during the evening; and all three adults said that the first the mother knew about the incident was on the trip home from the airport. The three gave differing accounts of how it came about that they decided to say that YW had fallen down stairs. In the course of the investigation, the mother told the social worker that NA had arranged for her to travel to North Cyprus to marry his cousin, that she had travelled around Europe on other occasions, arranged by NA, for the purpose of entering sham marriages, that she had told YW's father about these activities who had warned her that NA was dangerous,

and that she believed that NA had sexually assaulted YW and physically assaulted her on another occasion.

18. The hearing took place between 4 January and 5 February 2021. It had been listed for seven days but ultimately extended over fifteen days. It was conducted remotely through MS Teams but was apparently beset with technical problems. By this stage, the mother had returned to Poland, where she had given birth to a second child in October 2020 and from where she gave her evidence. The father apparently gave evidence from Austria. Over the fifteen days, the judge heard oral evidence from only eight witnesses – which perhaps indicates the extent of the technical problems – namely the mother, the father, NA, SA, SN, the mother's sister, and two social workers. Although the Court had the benefit of medical reports from two of the treating doctors, Dr SM and Dr T, and a court appointed expert, Dr Kavita Chawla, a consultant paediatrician, none of the doctors gave evidence. In her judgment, the judge observed that at the outset of the hearing, the parties had stated that they did not require any medical witnesses to be called, although she added that the mother disagreed with certain aspects of the medical evidence. For reasons that I will expand on below, I find it surprising that Dr Chawla at least, and possibly the treating clinicians, were not called.

19. For the hearing, Local Authority A prepared what was called "a composite threshold and schedule of findings" in which it set out over fifteen pages the findings it was seeking, under three broad headings:

    (1) against the mother, NA and SA – failure to protect and placing YW at risk of significant physical, emotional, sexual harm and neglect

    (2) non-accidental injury – findings sought against the mother, NA, SA and SN, and

    (3) findings sought against the mother – emotional and physical harm and welfare.

    Under the second heading, Local Authority A's case at the outset of the hearing was, in short, that YW had sustained significant facial bruising which "had a high likelihood of non-accidental injury" and was inconsistent with the suggested mechanism; that the mother, NA and SA had colluded to provide misleading and false explanations of the causation of the injury; that the injury was inflicted "deliberately, recklessly or negligently" by NA, SA or SN (not, it should be noted, the mother); and that, in the absence of a finding against one perpetrator, "neither [sic] can be ruled out". The extensive findings sought under the first heading included a finding that the mother had left YW in the care of NA, knowing he was dangerous. Under the third heading, it was alleged that the mother's chaotic and itinerant lifestyle had placed the child at risk of significant harm; that she misused drugs and alcohol; that she failed to work with professionals and lacked honesty and openness; that she suffered from mental ill-health and had self-harmed; and that she had travelled abroad to enter into sham marriages. At the outset of the hearing, the four respondents all had different responses to these allegations which it is unnecessary to set out.

20. Unsurprisingly, the accounts given during the oral evidence were different in many respects from those given before, so that by the end of the hearing there had been various changes of position which were reflected in written closing submissions filed by the parties on 15 February. Local Authority A argued that none of the four adults – the mother, NA, SA or SN – were credible or reliable witnesses and that in those

circumstances all four of them should remain in the pool of possible perpetrators. In the event that the court concluded that the evidence supported a finding that the injury had been sustained by a fall from a toy car or bicycle, Local Authority A sought a finding that the mother, NA and SA had failed to protect YW by delaying seeking medical attention. Local Authority A maintained its case against the mother, NA and SA in respect of the wider failure to protect and against the mother in respect of the other matters under the third heading. In addition, it sought findings that went beyond the case set out in the threshold document in two respects. First, in the light of evidence that had emerged during the hearing that YW had sustained a bruise near her eye on 3 October 2019, findings were sought that the injury had been inflicted non-accidentally by either the mother or NA or, if sustained accidentally, that the mother had failed to protect the child by not seeking medical attention. Secondly, a finding was sought against the father (who had been unrepresented during the hearing which he had joined from Austria) that he knew about the dangers to YW arising from the mother's lifestyle and relationship with NA and failed to act on them so as to protect his daughter, that he had not been open and honest with professionals, and had deliberately concealed information regarding the risks the mother and NA posed to YW.

21. It is again unnecessary to set out in any detail the respective positions of the other parties at the end of the hearing, which had all undergone transition in the light of the evidence, which had included extensive cross-examination of the adults and examination of text messages passing between them. In short, their positions were as follows. The mother's case was that YW had sustained her injury while she was out of the country. It should be noted that the mother's case on her reasons for leaving the country on 31 October had changed again. It was now her case (as summarised in her counsel's closing submissions) that she had intended to travel to Cyprus to collect her marriage certificate so she could apply for the father's settlement visa in the UK. She no longer asserted that NA was a dangerous man for whom she had undergone sham marriages. NA's case was that he did not know how the injury had been sustained but that it was more likely that it had been caused accidentally. He denied the allegations of trafficking and involvement in sham marriages. SA's case was that the injury was sustained as a result of an accident while the children were playing together, and KA rode his bike into YW causing her to fall. SN invited the court to find that he was not responsible for inflicting the injury. It was submitted on his behalf that the "pathway of symptomology" provided by the medical experts "rules in" the explanation of a fall given by SA and that the medical evidence had to be balanced carefully against the various narratives given by the other adults. Local Authority B submitted that the only logical explanation for the "myriad of lies" was that the injury was inflicted and that, given the extent of the lies, it was not possible to identify a perpetrator, so that all four adults remained in the pool. On the other hand, it was the guardian's case at the end of the hearing that the court could <u>not</u> be satisfied on a balance of probabilities that the injury was inflicted. In the event that the court reached a contrary conclusion, the guardian contended that NA and SA, but not the mother or SN, should be in the pool of perpetrators. The guardian supported findings that the mother, NA and SA had failed to protect the child by delaying seeking medical attention; that, if the mother believed some or all of her allegations against NA (by then retracted), she had failed to protect YW by leaving her in his care; and that the mother, NA and SA had all colluded to mislead the professionals as to the cause of YW's injury. The guardian further supported some but not all of the further findings against the mother under the third heading.

22. The father, who as already noted was unrepresented in the hearing, did not present any closing submissions to the court. He had attended via video link on some of the days. Although he had been assisted by an interpreter providing a simultaneous translation during the hearing, he had chosen to ask questions himself in English. In the course of his evidence the judge warned him that she may consider making findings against him. The father did not attend the last two days of oral evidence. Copies of the other parties' submissions, which ran to over a hundred pages, were sent to him by the local authority solicitor. Following inquiries through the court-appointed interpreter, at the judge's request an email was sent to him by Ms Greenwood, counsel for the guardian, in which she summarised the allegations against the mother, and the findings which were being sought against him, and saying "the judge wants to ensure that you have a chance to say what you think she should decide". She explained that his comments should be in writing and that arrangements could be made for the other parties' submissions to be translated. He was also warned that the court would proceed and "if appropriate make findings in your absence unless there is a good reason why you cannot attend". On 17 February, two days after the other parties had filed their closing submissions, the mother's solicitor sent an email to the court stating that the mother had spoken to the father who had said he intended to file written submissions that day in Urdu. The judge replied that any submissions should be translated, and Local Authority A responded offering to arrange for the translation. Further emails were sent encouraging him to file submissions. In the event, no submissions were filed.

23. Judgment was handed down on 5 March. I shall consider it in more detail below. The findings made by the judge are set out at different points in the judgment but can be summarised as follows.

(1) The mother had lost her temper with the child on 31 October 2019 and inflicted the injury.

(2) NA heard and saw what the mother had done and had failed to protect the child.

(3) YW sustained a significant injury to her eye on or around 3 October 2019 whilst in the mother's care, caused by excessive physical chastisement and loss of control.

(4) The mother failed to protect YW by not seeking medical attention for the injury sustained on 3 October, and failed to mention this injury when the child attended hospital on 1 November.

(5) The allegations made by the mother against NA of sexual assault were untrue and deliberately made up.

(6) The allegation that the mother had undergone sham marriages arranged by NA was untrue.

(7) NA arranged for the mother to travel to Cyprus for an illicit purpose, although the judge did not speculate further about that purpose. NA was keen to conceal her absence and therefore was party to the fabricated story that she was present when the injury was sustained.

(8) The mother took drugs and led a chaotic and itinerant lifestyle which failed to bring stability and security to the child. She has a history of self harm which she concealed from the professionals.

(9) The mother and father had not been honest with professionals, lied about their relationship, and concealed or retracted information which impacted on YW's safety.

(10) The mother had a sexual relationship with NA, made false allegations against him about drugs, possessing a gun and sham marriages, and had blackmailed him.

(11) SA was isolated and vulnerable. She protected her own daughter but failed to protect YW by insisting on getting medical attention.

(12) No findings were made against SN beyond his admission that he should have checked on the children while he was looking after them.

24. Several of the parties asked the judge for clarification of her findings, and these were provided in a composite document. To many of the inquiries the judge simply responded that she had already dealt with the matter or that no further reasons were required. In answer to the same question posed by several respondents, the judge said that she had concluded that the alleged collision with the toy vehicles took place but was not the cause of the injury, adding to one query that "it is confused and utterly contradictory". In answer to a question from the guardian, she elaborated on her findings against the father, holding that he had failed to protect YW by leaving her in her mother's care despite being aware of her drug-taking and other dangerous behaviours.

25. On 9 April, the mother's solicitors filed a notice of appeal against the findings made against their client. On 25 May, I granted permission to appeal on seven of the grounds – broadly speaking those relating, directly or indirectly, to the findings relating to the injuries sustained by the child on 3 and 31 October 2019 – but refused permission on the other grounds. In granting permission, I observed: "the focus of this appeal is on the judge's finding that the injuries sustained by YW on 3 and 31 October 2019 were inflicted by the appellant mother. It is arguable that the judgment is lacking in structure and insufficiently reasoned. On a preliminary reading, it is difficult to identify where the judge carried out an analysis of the conflicting evidence before reaching her conclusion. For those reasons there is a real prospect of success on the grounds for which permission is given."

26. On 14 June, the father sought permission to appeal against the findings made against him, arguing in his case inter alia that the process by which the findings were made was unfair. On 16 June, I granted him permission to appeal and directed that the appeals be heard together.

27. A few days before the hearing of the appeal, this Court received an application to adjourn the appeal from the appellants. The reason for the applications was that, some weeks earlier, the local authority had disclosed additional evidence relating to the causes of the injury suffered by YW on 31 October. As a result, the parties had applied to the judge to re-open her findings. At a hearing on 23 June, the judge (according to a note prepared for

us by the local authority) questioned the appropriateness of her proceeding with a reopening application when the matter was pending before this Court to be heard the following week. She therefore adjourned the application to re-open to a date next month to allow the parties to consider whether to (1) withdraw the appeal and pursue the reopening application, (2) apply to adduce new evidence on appeal, or (3) not pursue the reopening application and proceed with the appeal. In the event, the parties elected to follow none of these options sensibly suggested by the judge but instead applied to adjourn the appeal. On receiving this application, Moylan LJ refused the application whilst indicating that the parties could renew it at the hearing of the appeal.

28. In the event, at the hearing, no party argued strenuously for an adjournment. It would plainly have been wrong to adjourn the appeal to allow the parties to pursue an application to re-open findings of fact that were the subject of an appeal to set them aside. It might have been open to the appellants to apply to admit the new information (which we have read *de bene esse*) as fresh evidence on the appeal, but neither of them took that course.

The judgment

29. The judgment runs to 112 pages although compared to most judgments there are relatively few words on each page. The paragraphs are unnumbered so in citing passages from it I shall refer to internal page numbers. The judge started by identifying the parties. Then she described some of the problems that bedevilled the hearing, including technical difficulties, the problems caused by the father's apparent inability or reluctance to engage with the process, the failure of the mother, father, NA and SA to provide full disclosure of their text messages, and fact that, as she put it, "the case is enmeshed in lies, misrepresentations, deliberate obfuscation and constant inconsistency from the main participants namely the father, NA, the mother and SA." She then summarised briefly the history of the child's arrival at and examination in hospital on 1 November, and the history of the proceedings.

30. At internal page 11, the judge alluded to the fact that during the hearing it had become apparent that YW had sustained an earlier injury on or about 3 October. She briefly summarised the parties' respective cases as to the causation of the injury sustained on 31 October. She referred to the large number of inconsistencies and to a schedule summarising them prepared by Ms Greenwood. At page 13, she set out the legal principles which she said had been agreed by counsel. This exposition extended for 16 pages and includes references to thirty reported authorities. Under a heading "The Proceedings", the judge listed the witnesses who had given evidence, several of whom had required interpreters, and described some of the difficulties that had been experienced, in particular with the parents' evidence.

31. From pages 34 to 45 the judge summarised the medical evidence given by Dr SM and Dr T and the expert evidence given by Dr Chawla. She quoted at length from Dr Chawla's first report, including passages when she had been asked to describe the relevant features of the injury and to comment on all possible causes or mechanisms for the injury. She also set out Dr Chawla's observations about the timing of the injury and whether the child would have experienced pain. For some reason, however, the judge omitted the doctor's response to a question "Please compare the likelihood of each cause or causes identified as reasonable possibilities being the actual cause of the relevant injuries and whether you consider that one is more likely than not and provide

your reasons for reaching that conclusion." At the time she was asked that question, the explanation suggested by the adults was that YW had fallen down stairs. In answering the question, Dr Chawla reiterated a number of points which she had made earlier in her report and which were quoted by the judge – that the injury was very likely due to blunt force trauma, that in her opinion it were more likely to have resulted from YW falling down the stairs, that headbutting was an unlikely cause, and that blunt force trauma inflicted by an instrument was more likely to be associated with a fracture. Dr Chawla then added:

> "In my opinion, this injury is likely to be accidental, although I note several inconsistencies in the statements and stories offered."

This sentence was not quoted by the judge in her judgment. She went on, however, to cite passages from supplemental reports in which Dr Chawla had said that, if the court accepted SA's account of the incident involving the bike and the toy car, "then both the timing and the causation of the injury, in my opinion on a balance, are plausible." She added Dr Chawla's further observation that there had been a delay in seeking medical attention for YW. She quoted Dr T's opinion that it would be impossible to say that the injury had not resulted from the account given about the incident involving the bike and toy car, and that she also thought there had been a delay in seeking medical attention.

32. The judge then referred to Dr Chawla's opinion as to the injury sustained on 3 October, which had been disclosed during the hearing and about which Dr Chawla had been asked to comment in a further supplemental report. The doctor expressed the view that the injury could have been caused in the way described by the mother, namely by YW's face striking a window ledge, and that it was reasonable for the mother to wait to see how the injury developed rather than seek medical attention. She added, however, that the earlier injury should have been mentioned when the child was seen in hospital on 1 November.

33. Next, the judge set out the evidence given by the mother's sister, MD. She described her as "not only reliable but utterly honest" and "a good-hearted and well-meaning lady who has tried her best for the family and is genuinely concerned about YW". It was MD who produced photographs of YW showing a black eye (as did NA) and this led to the disclosure of the incident on 3 October. The judge recorded that MD gave evidence about the mother's lifestyle, that she took drugs, left YW on her own and did not feed her properly, shouted at the child and talked about her "in a bad way". She quoted messages passing between the father and MD which apparently corroborated these allegations. The judge rejected the father's assertion that those messages had been fabricated. She concluded: "my acceptance of the evidence of MD is critical in this case as so many of the other lay witnesses have been inconsistent and unreliable."

34. The judge then set out the evidence given by the social workers. Much of this evidence consisted of interviews with or statements made by the mother. As she went through this evidence, the judge made a series of comments and findings adverse to the mother. She noted that during one interview the social worker had described YW as being extremely distressed and wanting her mother whereas the mother was ignoring the child. The judge observed that this

> "is an important indicator as to the mother's emotional presentation and her lack of ability to sympathise with her. It is illustrative of the relationship which is also described in the medical records, where she is sometimes depicted as emotionally unavailable for the child and failing to respond to the emotional needs of the child."

Noting that, despite her allegations about the dangers posed by NA, the mother had returned to stay with him, the judge observed that this

> "indicates to me that she has no fear whatsoever of NA and the allegations which she has made against him have to be treated with extreme caution. She is wholly unreliable."

She added that there was no other evidence that NA had a firearm or that he was involved in drugs and that the mother did not appear to be frightened of him. She added:

> "… these lies were calculated and intended to cause harm to NA … She throughout tried to deflect any blame onto others."

At page 59, the judge said:

> "My acceptance of the social worker's evidence shows that the mother is a dangerous person who causes chaos in her wake but is also very vulnerable and a damaged person."

These observations were made during the judge's summary of the evidence given by the social workers, before she had considered the evidence of SA or NA or the mother herself.

35. The judge then considered the evidence given by SN, noting that no party had actively alleged that he did or could have injured the child, that he had never been interviewed by the police. She described his evidence as largely credible, reliable and consistent.

36. Next the judge considered the father's evidence. She found that he was anxious to give an impression that he had a secure and happy relationship with the mother. She referred to text messages he had produced the day after the mother's evidence which she described as being fabricated by him or the mother. She described him as showing little, if any, emotion about YW's injuries and a "remarkable lack of concern" about her wellbeing, adding that his commitment to the proceedings was "questionable" having failed to participate at times and absenting himself for the last two days of the hearing. She rejected, however, the local authority's case that the marriage was a sham.

37. From pages 65 to 79, the judge summarised the evidence of SA in some detail. As she went through the evidence, the judge indicated at various points where it conflicted with other evidence. She noted that SA had lied on many occasions, particularly to the police and social workers. The question was why she had lied. The judge concluded that the reason was

> "that she was in a confused and low state of mind and had been rattled by threats which I accept were made by NA as to social services' involvement."

The judge observed that SA's evidence had to be looked at in context and noted that there was no evidence that she had led a life which impacted on her daughter's stability and that she had shown herself to be a good mother. The judge continued:

> "she came over as a credible witness albeit that she has previously knowingly lied. However, guided by the relevant legal authorities (see agreed law) I remind myself that I must look carefully at the reasoning for lies. In this case I find her lies were made out of panic and fear and she was not in the right place or exercising common sense. She had gone to the home of NA, a man whom she hardly knew, and that was the start of a disastrous unfolding of events in which she became mired. One lie led to another lie, but essentially she has told the truth …"

The judge then listed a number of matters about which she found SA to be telling the truth. She then added:

> "I find that she stayed at the house thereafter as she was still confused and upset and down, She knew she had lied as to the causation of the injury and really did not know where to turn."

These findings about the matters on which SA had lied and on which she had told the truth were made before the judge had set out the evidence of NA or the mother.

38. Between pages 70 and 91, the judge summarised the evidence of NA. As with previous witnesses, as she went through his evidence she indicated at various points her views about it. She began by describing him as an intelligent man who had given his evidence in a straightforward manner but added that he had told material lies and been wholly inconsistent. As with NA, the question was why he had lied.

> "Is this evidence that he has something to hide, or is it for some other reason (R v Lucas)"

The judge then listed some matters on which she found he had lied. After comparing his evidence with SA's account on several issues, she said that she preferred her evidence to his. She then said that:

> "His lies and his inconsistencies were, in my judgment, told (he himself agrees he has lied) to hide something."

She found that he

> "knew perfectly well that he was blaming SA to deflect responsibility from what he knew about the injury on 31 October."

39. At page 84, in the middle of the judge's consideration of NA's evidence, the judge set out her finding on the causation of the injury:

> "I find that when the mother came to live with him he was caught up in her lifestyle, developed a sexual attraction to her and they had a sexual relationship. He was involved in the mother's

> arrangements to go to Cyprus for what appears to be an illicit purpose.
>
> That night, she had come in late as he himself related (she denies this) and the child had cried. The child had previously been injured (as hereinafter related). I find that, on the balance of probabilities, the mother lost her temper with the child (see evidence of MD as to her habit of so doing) and inflicted the injury on the child. NA heard this and saw what the mother had done and failed to protect the child. He wanted the mother to go to Cyprus and he, thereafter, assisted her in her travels. He took her to the airport and he collected her from Birmingham."

40. Having set out her conclusion, the judge then continued with her commentary on NA's evidence. She observed:

> "In my judgment it is highly unlikely that he himself caused the injury to YW (albeit that YW was fearful of going to him) because the history does not indicate that that is the nature of his temperament. There is no allegation at all that he has physically chastised his own son nor that there had been previous injuries to KA. I find that he is also not a man who loses his temper, but he is deceitful and manipulative."

She then considered his evidence about the mother's trip to Cyprus. During this analysis, she indicated that she accepted the mother's assertion that she was sent to Cyprus by NA was correct and that the circumstances were such that she concluded that there was an illicit purpose. She added:

> "In my judgement she was intercepted at Turkey because NA had telephoned her to tell her that the injury had now developed into something quite unacceptable. He told her that the child needed medical attention and she had to return. She had to be the one who brought the child to hospital otherwise questions would be asked as to why she was out of the house and out of the country and what she was doing. They 'cooked up' a story to hide the purpose of the Cyprus trip and the causation of the injury."

The judge concluded that the reason for NA's lies was that he was fearful of the mother, that he knew she could blackmail him because of their relationship and his involvement in the illicit trip to Cyprus.

41. At page 91, after already indicating her findings on the key issue in the case, the judge turned to the mother's evidence. Unlike the other witnesses, however, she does not set out the mother's accounts in any detail. She observed that almost everything she said was unreliable and/or a clear lie. At page 92, after referring to the lies the mother had told at the hospital, the judge said:

> "it is clear that her own child had been severely injured. If she was 'innocent', she would have wanted the best medical

> treatment for that child in the context of clarity of history. She would not have lied. Her lies were not told out of panic or fear. She had something to hide."

The judge continued:

> "The following evidence is important in the context of my findings which are that I have concluded that [the mother] is the perpetrator of the injuries on her daughter YW and that she alone is the perpetrator. I do not find that these injuries were caused accidentally in a collision of the car/bike.
>
> Although the guardian is of the view that there are so many lies that I cannot find a perpetrator, and I further cannot discount the accidental explanation given by SA, [the mother] and NA, I disagree for all the reasons given in this judgment.
>
> It is clear to me on a very careful and detailed analysis of the evidence (as I have given) that I am not striving to find a perpetrator (as indeed I must not do) but that it is clear to me on a balance of probabilities that [the mother] caused the injuries to her daughter when she lost her temper in the early morning of 31 October 2019.
>
> I find that as asserted by NA, [the mother] had been out with YW and returned late. She already had difficulties coping with the care of her daughter (as is clear from the messaging produced by MD and NA). She denied that she had come in late but in my judgement that was a lie.
>
> When her daughter disturbed her sleep and/or cried, she brought her downstairs (as stated by NA) and in my judgement on a balance of probabilities lost her temper with the child. Blunt force trauma was causative of the injuries to YW which subsequently unfolded.
>
> It is of note, and I accept, that NA stated to SA that the child had been upset because her mother had left. In my judgement he was a witness to the injuries, and he knew that [the mother] had lost her temper. That was the reason he told SN not to check on the children. He did not want this child further disturbed and for her to have further episodes of crying and distress ….
>
> Although (as I have already found) she had intended to be away for some days in Cyprus, I find that when she arrived in Turkey NA told her that the injuries were, in fact, extremely bad and that she would have to return home as the child needed medical attention. NA was not willing to take the child to hospital for two reasons (a) he was aware as to how the child had received her injuries (b) he needed the mother to come back to this country as

> she had gone to Cyprus for illicit purposes which he and the mother had planned."

42. The judge then continued with her findings about the mother, setting out in some detail the matters on which she found that she had lied. At page 102, she turned to the earlier injury sustained on 3 October. She noted that the medical evidence was that the mother's account was consistent with the nature and presentation of the injury, the judge added that she had to consider all the evidence. Having noted that the mother had not sought medical attention, that NA had not been present, that the mother had missed an appointment with her GP, and that it had not been mentioned when YW had been taken to hospital on 1 November, she concluded that it was inflicted by the mother.

43. The judgment concluded with a recital of the judge's findings as summarised above.

The arguments on appeal

44. The grounds on which the mother was granted permission to appeal were, in summary, as follows:

(1) In identifying her as the perpetrator of the injury on 31 October, the judge relied heavily on a number of other findings against the mother, including her credibility, but failed to point to any and/or sufficient evidence specific to support her conclusion that she was the perpetrator. There is no or no sufficient evidence to indicate that the mother was the perpetrator of the injury.

(2) The judgment is against the expert opinion and the medical evidence. The judge referred to this evidence in her judgment but did not substantiate her findings with any of the expert opinion. In fact, her finding that the mother was the perpetrator of the injuries runs counter to the expert opinion.

(3) It was unreasonable to find that the mother delayed taking the child to hospital.

(4) The finding that the mother inflicted an injury on YW on 3 October is contrary to the expert and other evidence.

(5) The finding that she failed to protect the child by not seeking medical attention after the injury on 3 October is contrary to the expert and other evidence.

(6) It was perverse and unsafe for the judge to rely on SA's evidence to support her findings. The judge highlighted the lies, the inconsistency and discrepancy in that evidence yet found her to be a credible witness.

(7) The judge's findings are against the principle and guidelines set out in case law.

45. In presenting the appeal to this Court, Ms Cleo Perry QC, who did not appear in the court below, put forward as her primary case that the judgment was unsafe because it was, in Ms Perry's phrase, linear in analysis and therefore unsafe. There was no clarity about the wider canvas of the evidence, and no attempt to step back and consider the evidence as a whole. The judgment lacked reference to primary evidence, lacked a balanced approach to the evidence, and treated lies as primary evidence rather than corroboration. Key questions had been neither asked nor answered. The analysis in the judgment, such as it was, began and ended with the mother's credibility. The judge

failed to explain how her findings about the mother's lifestyle, her "illicit" trip to Cyprus and her lack of honesty led her to conclude that she had inflicted the injuries. If, as seems to be the case from the judge's response to the requests for clarification, she accepted SA's account that there was an accident on the bike or toy car, she failed to explain why she nevertheless rejected it as the cause of the injuries when the medical evidence indicated that it was a possible explanation, nor does she assess the inherent improbability of the accident having happened but not being the cause of the injury. There was no analysis of how the injury was inflicted on 3 October, nor any explanation as to why she rejected the medical evidence that it was not unreasonable for the mother not to seek medical attention.

46. The principal ground of appeal put forward by the father was that the process through which findings adverse to his case were made against him was not, taken as a whole, a fair process which gave due regard to his rights under Article 6 of the European Convention of Human Rights and the relevant domestic jurisprudence. In a further ground of appeal, the father contended that the judgment handed down did not sufficiently explain the judge's reasoning for making the findings against the father and did not properly have regard to each piece of evidence in the context of the totality of the evidence before reaching her conclusions. Mr Senior acknowledged that the father might be open to criticism for absenting himself from the final stages of the hearing, and not responding to emails, but submitted that the fact that he may have been the author of his own misfortunes does not disqualify him from the right to fair trial. Having received the other parties' submissions, and the email from the mother's solicitor on 17 February, the judge ought to have paused to reconsider and reflect on whether a fair process required that the father should be allowed further time to absorb 125 pages of skeleton arguments and schedules and the details of the findings sought against him which were not presented to him in his native language, Urdu.

47. These arguments were developed and countered in detailed skeleton arguments filed on behalf of the parties. Local Authority B supported the mother's appeal but was neutral on the father's appeal. SN was neutral on both appeals. All the other respondents opposed both appeals. This Court is of course very grateful to counsel for their submissions which unsurprisingly ranged widely over the issues and evidence. In the light of the conclusion I have reached on the central argument advanced by Ms Perry, many of those submissions fall away. The key arguments can be summarised as follows.

48. On behalf of Local Authority B, Ms Rhian Livesley, supporting the mother's appeal, described the judgment as lacking analysis and reasoning. When considering the injury sustained on 31 October, the judge reached her finding early on and looked for evidence to support it, rather than assessing all the evidence before making the finding. She submitted that the judge failed to follow the guidance in *R v Lucas* so that as a result there was a complete lack of consideration of other possible explanations for the mother's lying. The judge failed to consider other possible explanations for the injury or evaluate the evidence which pointed to the mother not being the perpetrator. It is, of course, SA with whom Local Authority B is principally concerned, and Ms Livesley submitted that the judgment contained no real analysis of why SA changed her story, nor a convincing explanation of why she accepted the story which the judge described in the clarification response as utterly confused. She conceded that with hindsight Dr Chawla should have been called to give oral evidence, given the uncertainty as to the cause of the injury.

49. On behalf of Local Authority A, Ms Lorraine Cavanagh QC, who did not appear at first instance, submitted that the findings that the mother had inflicted the injuries sustained on 31 October and earlier on 3 October were fully supported by the evidence and sufficiently reasoned in the judgment. In the course of the hearing, Ms Cavanagh conceded that the reasoning had not been set out at the end of the judgment but spread throughout the judgment. She also conceded that not all the relevant evidence was identified in the judgment and that in some respects one had to go to the supporting documents. In a case where the facts and allegations were so dense and plentiful, and the evidence so detailed, it was simply not possible for the judge to illustrate a finding of fact with more than one or two examples or to point to the witness whose evidence was accepted on the point. When it was suggested that the judgment lacked an identifiable structure, Ms Cavanagh demurred, suggesting that it contained the background, then the medical evidence, the law, the various explanations, the 3 October injury and then the findings. At numerous points, the judge reminded herself of the relevant legal principles. Ultimately, her task was to decide whether the most likely cause of the injury on 31 October was the accident which she found had occurred or an assault by one of the adults. Having decided that the accident was not the cause, she then had to identify the perpetrator. Ms Cavanagh submitted that the judge undertook this exercise meticulously. She was entitled to attach particular weight to the mother's extensive lying and dishonesty, in the context of other evidence about the mother's deficiencies as a parent, demonstrated in particular by the evidence of her sister, MD, which the judge accepted. As to the 3 October injury, it was open to the judge to find that the mother had inflicted the injury, given the evidence that she was unable to cope with the child, that she had missed a GP's appointment, and that she failed to mention the injury when the child attended hospital on 1 November.

50. As to the father's appeal, Ms Cavanagh stressed that he had elected to act in person, that he had been able to cross-examine some of the witnesses in English, that he had been provided with a simultaneous interpreter which he preferred not to use, that the local authority had arranged for documents to be translated into Urdu, that the judge had regularly checked that he was following the evidence, and that she had expressly warned him of the possibility of findings being made against him. The efforts made to ensure that he filed submissions in response to those filed by the other parties were sufficient and fair in the circumstances. He was given a number of warnings that findings could be made against him. All the indications were that he had disengaged from the proceedings.

51. In short, this was a case which fell squarely within the principle that this Court should not interfere with the findings of a judge at first instance who had had conduct of the case for over a year, read over two thousand pages of evidence, and heard oral evidence over fifteen days. The findings were based on the evidence and there was no material irregularity in the process by which she arrived at the findings.

52. The submissions on behalf of Local Authority A were adopted and supplemented by counsel on behalf of the guardian, NA and SA. As the hearing before us proceeded, however, some counsel accepted that there were deficiencies in the judge's analysis. Ms Greenwood for the guardian conceded in the course of the hearing that parts of the jigsaw were missing from the judgment, in particular the analysis of the medical evidence, but she submitted that overall the judgment contained sufficient reasoning, save perhaps in respect of the finding that the mother had failed to protect YW by not

seeking medical attention after the 3 October injury. Ms Greenwood conceded that this finding could be set aside but the other, more substantial, findings should not be disturbed. Ms Kirstin Beswick on behalf of NA accepted in answer to a question from Moylan LJ that the judge had not balanced the medical evidence against the other evidence, including the lies and inconsistencies, but also submitted that the judge had been entitled to conclude that the injuries were inflicted by the mother, having regard to the specific provable lies and the evidence of the mother's sister, MD. Mr Ian Haselhurst for SA focused his submissions on his client, relying on the detailed analysis of her evidence in the judgment in which the judge had given a full explanation of her conclusions about SA's lies and why she excluded her as a perpetrator of the injury sustained on 31 October. On behalf of SN, Ms Lisa Edmunds adopted a neutral position on both appeals. She noted that no party had sought any findings against him, and proposed that, if the appeal were to be allowed and the case remitted for rehearing, he should be discharged as a party and called as a witness if required.

Discussion and conclusion

53. Before considering the merits of these appeals, it is important to record some preliminary points. First, I recognise that this was an extremely challenging hearing. As a result of the pandemic, it was conducted remotely by Microsoft Teams. Experience is increasingly demonstrating that fact-finding hearings of any degree of complexity that are conducted remotely are sub-optimal. In this case, there were eight parties, one acting in person. Two of the parties joined the hearing from abroad. On several days, there were technical difficulties. There were issues with interpreters. There were over two thousand pages of documents. There were all sorts of difficulties concerning the disclosure of text messages and social media activity by some of the parties. The history of the matter was complicated, not least by the many lies, inconsistencies and contradictions in the evidence.

54. Secondly, I take into account that this very experienced judge was well used to conducting cases of this complexity, that she had been responsible for case management in the proceedings for over a year, and plainly had a clear understanding of the issues.

55. Thirdly, I acknowledge of course that the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance and that an appeal court must not interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. I bear in mind the warning given by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 115 that the expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed, that in making her decisions the trial judge will have regard to the whole of the sea of evidence presented to her, whereas an appellate court will only be island hopping, and that the atmosphere of the courtroom cannot be recreated by reference to documents.

56. But in carrying out her judicial task, the judge must provide a sufficient explanation of her reasoning. She must explain why her assessment of the witnesses leads to her conclusions. She must consider the totality of the evidence. In this case, I regret to say that I agree with Ms Livesley's criticism that the judgment lacks analysis and reasoning and that the judge gave the appearance of having reached her finding early on and then

looking for evidence to support it, rather than assessing all the evidence before making the finding. It is a fundamental flaw in this judgment that the judge failed to draw the threads together and carry out a rigorous and coherent analysis of the various possible causes of the injury sustained on 31 October before arriving at her conclusions.

57. The judgment lacked a clear structure. There was no summary of the issues, or the findings that each party was seeking on the issues. There was only a partial chronology. The evidence was not analysed by reference to the issues but rather recited witness by witness. There was no discussion section drawing together the threads of the evidence which in many respects pointed in different directions. The judge announced her decision halfway through her recital of the evidence. I accept that a judgment must be read as a whole and that, as McFarlane LJ (as he then was) said in *Re R (A Child) (Adoption: Judicial Approach)* [2015] 1 WLR 3273, at [18], what is really important is "the substance of the judicial analysis, rather than its structure or form". Nonetheless, structure is valuable because it can help to ensure clarity of reasoning and analysis. As McFarlane LJ also observed in *Re N-S (Children)* [2017] EWCA Civ 1121 at paragraph 30:

> "30. The need for a judge to provide an adequate explanation of his or her analysis and the reasoning that supports the order that is to be made at the conclusion of a case relating to children is well established. Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to follow an alternative course), it is also likely to be important for those professionals and other judges who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead. In addition, of course, inadequate reasoning is a serious impediment to any consideration of the merits of the judge's decision within the appellate process."

58. In *Re S (A Child: Adequacy of Reasoning)* [2019] EWCA Civ 1845 at paragraph 3, Peter Jackson LJ set out the issues that arose in that case:

> "(1) Had the local authority proved that the injuries were inflicted as opposed to being accidental?
>
> (2) If the injuries were inflicted, who had the opportunity to cause them?
>
> (3) Of those people, could one person be identified on the balance of probabilities as having inflicted the injuries (a conventional 'known perpetrator' finding)?
>
> (4) If only two people … could have caused the injuries, but the one responsible could not be identified it necessarily followed that there was a real possibility that each of them may have caused the injuries (an 'uncertain perpetrator' finding).

> (5) Once these questions had been answered, had it been proved that the mother had failed to protect [the child] from being injured or covered up what she knew about how he was injured?"

In the present case, the judge cited this passage at the end of her exposition of the law, but chose not to adopt the approach herself. Although the facts in the present case were more complex with evidence pointing in different directions, a similar approach might have enabled the judge to explain her reasoning and her conclusions.

59. In *Re S*, this Court concluded that the analysis of the judge at first instance had been insufficient. As Peter Jackson LJ said at paragraph 34:

> "I would also accept that a judgment must be read as a whole and a judge's explicit reasoning can be fortified by material to be found elsewhere in a judgment. It is permissible to fill in pieces of the jigsaw when it is clear what they are and where the judge would have put them. It is another thing for this court to have to do the entire puzzle itself. In my view, there is so little reasoning underpinning the judge's conclusions that we would have to do this in order to uphold her decision, and if we were to attempt it there is no knowing whether we would arrive at the same conclusion."

In that case, the judge's reasoning had been perfunctory. In the present case, the judgment is much longer. But in my view the reasoning is also deficient. In particular, there is no explanation of why the judge concluded that the mother's lies were probative of her responsibility for the injuries when: (1) NA and SA had also lied repeatedly about the circumstances of the injury on 31 October; (2) there were plainly many other reasons why the mother might have lied; and (3) the medical evidence was, at least, capable of supporting the conclusion that each of the injuries had been sustained accidentally. There is force in Ms Perry's observation during the hearing before us that the other parties, in particular Local Authority A, have strained in their submissions to fill the gaps left by the judge. In the course of their oral submissions to this Court, both Ms Greenwood on behalf of the guardian and Ms Beswick on behalf of NA conceded that there were omissions in the judge's analysis.

60. As I have already observed, this was a case where various strands of the evidence pointed in different directions. It is possible that the judge's conclusion – that the injuries were inflicted by the mother – is correct. But is also possible – in particular by reference to aspects of the medical evidence – that the injuries were sustained as a result of an accident, in the case of the injury sustained on 31 October perhaps the accident which the judge accepted had occurred. It is also possible that, if the injuries were inflicted, the perpetrator was one of the other adults in the house. To my mind, the judge does not provide any or any sufficient analysis why she preferred one explanation over the others.

61. As part of her exposition of the legal principles, which was based on a note agreed by counsel, the judge quoted from the judgment of Sir James Munby P in *Re Y (Children) (No.3)* [2016] EWHC 503 (Fam) in which he adopted my summary of the law in *Re L and M (Children)* [2013] EWHC 1569 (Fam), which in turn was an abbreviated version

of what I had said in in *Devon CC v EB* [2013] EWHC 968 (Fam). One of the principles identified in those cases, and cited by the judge, is that when considering cases of suspected child abuse the court must have regard to the wider canvas of evidence and take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. That in turn is derived from the observation of Dame Elizabeth Butler-Sloss P in *Re T* [2004] EWCA Civ 558 at paragraph 33:

> "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the Local Authority has been made out to the appropriate standard of proof."

This is often a challenging task, particularly in cases where, as here, there is uncertainty about whether an injury was accidental or inflicted, and if inflicted the identity of the perpetrator. The process of analysing the wider canvas has undoubtedly become more complex than it was in 2004 as a result of the explosion in social media. But it is an essential task for any judge conducting a fact-finding hearing in a case of suspected child abuse. In this case, as demonstrated by the citations set out above, the judge fell into the trap of evaluating the evidence in separate compartments and in my view failed to exercise an overview of the totality of the evidence.

62. The treatment of the medical evidence is also problematic. The local authority's case – that the facial bruising sustained by YW "had a high likelihood of non-accidental injury" and was inconsistent with the suggested mechanism – was not supported by the medical evidence. Over several reports, Dr Chawla clearly expressed the view that the injury could have been sustained accidentally, and at one point (not cited in the judgment) expressed the view that "this injury is likely to be accidental". She concluded that, if the court accepted SA's account of the incident in which KA had driven his bike into YW causing her to fall, "then both the timing and the causation of the injury, in my opinion on a balance, are plausible". Although the judge quoted this passage amongst other citations from the report, she did not return to it again when reaching her conclusion. In particular, she did not explain why, having accepted SA's account of the incident involving the bike, she rejected this as the cause of the injury notwithstanding Dr Chawla's opinion that it was plausible.

63. It would not be strictly correct to say that the judge's decision was contrary to the medical evidence. Dr Chawla did not rule out the possibility that the injury may have been inflicted. Indeed, she identified some features which were consistent with non-accidental injury, including the fact that the adults caring for the child gave inconsistent and changing accounts. But, as referred to above, Dr Chawla's evidence, in particular, was at least capable of supporting the conclusion that each of the injuries had been sustained accidentally. Furthermore, if the injuries were inflicted, none of the doctors suggested how that might have happened – Dr Chawla thought it unlikely that they had been caused by headbutting or the use of an implement. I recognise the importance of restricting expert evidence to matters which are necessary. In this case, however, there were lacunae in the medical evidence. For that reason, it would have been advisable for these matters to be pursued by asking Dr Chawla to give oral evidence, in particular, so that these difficult nuances in the evidence about causation of this unusual injury on 31

October could have been considered in greater detail in the dynamic context of the court room.

64. As it is, it seems to me that the judge neglected to bring Dr Chawla's opinion into account in her ultimate analysis. Given her evidence (not quoted by the judge) as to the injury on 31 October included that the "injury is likely to be accidental" and that the car/bike accident, if accepted as having occurred, was "a likely explanation", the judge ought to have explained why she reached a different conclusion. The judge is, of course, the person who makes the final decision. As Charles J observed in *A County Council v K, D and L* [2005] EWHC 144 (Fam) at paragraph 49:

> "In a case where the medical evidence is to the effect that the likely cause is non-accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non-accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof … The other side of the coin is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury (or human agency) and the clinical observations of the child, although consistent with non-accidental injury (or human agency), of the type asserted is more usually associated with accidental injury or infection, a court can reach a finding on the totality of the evidence that, on the balance of probability there has been a non-accidental injury (or human agency) as asserted and the threshold is established."

In this case, however, there was no explanation of how the medical evidence fitted into the judge's decision nor why, having decided that the car/bike accident had occurred, she rejected that as the cause of the injury on 31 October.

65. The judge made a series of critical findings about the mother from an early stage in the judgment, before she came to consider her evidence. She accepted the evidence of MD. She made some findings against the mother while going through the social worker's evidence. She reached conclusions as to those parts of SA's evidence which were true and those which were lies, and the reasons for the lies, before considering the mother's evidence. She made the slightly perplexing observation that, with regard to SA, "one lie led to another lie, but essentially she has told the truth". Then, during her description of NA's evidence, the judge suddenly stated her conclusion as to how the injury on 31 October had occurred. At this point in the judgment, the judge had not directly addressed the mother's evidence or the arguments submitted on her behalf. The judge then considered NA's evidence about the mother's trip and why she had returned from Turkey. Before she had properly considered the mother's case about this issue, she announced her conclusion that NA had summoned her home because the child's injury was "developing into something quite unacceptable" and she needed to be taken to hospital.

66. It was in my judgment wrong of the judge as she went through the evidence of each witness to provide a running commentary on its credibility. She ought to have set out the accounts and only reached her conclusions once she had considered the totality of the evidence. All judgments should be based on the totality of the evidence, but it was

particularly important to proceed in this way in the present case in which the evidence was complex and contradictory, and in which several of the important witnesses had manifestly lied about a number of matters.

67. When she finally reached the mother's evidence, some pages after announcing her finding that she had inflicted the injury on 31 October, the judge expressed this opinion about the reason for her lies at the hospital:

> "If she was 'innocent', she would have wanted the best medical treatment for that child in the context of clarity of history. She would not have lied. Her lies were not told out of panic or fear. She had something to hide."

Whereas the judge had carried out a lengthy analysis of SA's lies, looking to see what other explanations there might be other, she chose not to go through the same process when considering the lies told by the mother. There was no or no adequate analysis of the possible reasons for the mother's lies.

68. In her exposition of the relevant legal principles, the judge had referred to the well-known dicta in *R v Lucas* [1981] QB 720 concerning lies, to the effect that it is not uncommon for witnesses in these cases to tell lies in the course of the investigation and the hearing so the court must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress, and the fact that the witness has lied about some matters does not mean that he or she has lied about everything. The judge duly followed this warning when considering the lies told by SA, but I see little evidence that she did so when considering those told by the mother. On the contrary, the issue of the mother's lies overwhelmed the judge's whole analysis. I am reminded of the observation of Macur LJ in *Re Y (A Child)* [2013] EWCA Civ 1337 at paragraph 7:

> "… I consider the case appears to have been hijacked by the issue of the mother's dishonesty. Much of the local authority's evidence is devoted to it. The Children's Guardian adopts much the same perspective. It cannot be the sole issue in a case devoid of context. There was very little attention given to context in this case. No analysis appears to have been made by any of the professionals as to why the mother's particular lies created the likelihood of significant harm to these children and what weight should reasonably be afforded to the fact of her deceit in the overall balance. "

69. This was precisely the error made by the judge in the present case. The findings made by the judge as to the mother's lies, and to her character and lifestyle, may be relevant to her overall analysis, but she did not provide any or any sufficient explanation of why they led her to the conclusion that the mother had inflicted the injuries. She was obviously impressed by the evidence of the mother's sister, MD, and accepted her account of the mother's poor parenting and lack of emotional responsiveness towards her child. The assessment of evidence is the responsibility of the trial judge, but so is the apportionment of weight to be attached to each piece of evidence. In this case, the judge failed to explain her reasons for apportioning weight to one piece of the evidence over the other.

70. At the heart of the case there is an unexplored conflict of evidence. The judge found that the accident involving the bike and toy car had happened but also found that this was not the cause of the injury, notwithstanding the medical opinion that it could have been the cause. To my mind, the judge did not sufficiently explain why she found, on the one hand, that the accident had happened but, on the other hand, that it was not the cause of the injury. Ms Cavanagh submitted that, insofar as there were omissions in the reasoning on this point, these were repaired by the judge's responses to the requests for clarification. I disagree. Beyond responding to the same request from three parties to confirm that she had found that the accident did occur, and her observation that the evidence about it was utterly confused, I can see no additional analysis about this matter in the clarification document.

71. Ms Greenwood submitted that there are a myriad of ways in which blunt force trauma can be inflicted. I do not accept that submission. There are a limited number of ways in which such trauma can be inflicted. Even if Ms Greenwood's submission is correct, it does not obviate the need to analyse the issue forensically. Dr Chawla considered, but substantially discounted, two ways in which the trauma could have been inflicted. The judge did not address this issue at all.

72. Finally, I regret to say that the judge's treatment of the injury apparently sustained on 3 October was superficial. She does not to my mind give a sufficient reason for concluding that this injury, about which the evidence was very sparse, had been inflicted when the expert evidence was that it was consistent with the explanation given. In effect, the judge seemed to have decided that, having concluded that the later injury was inflicted by the mother, she also inflicted the earlier injury.

73. For these reasons, I conclude that the appeals must be allowed. The reason for allowing the appeals is best encapsulated in one of the father's grounds – that the judgment did not sufficiently explain the judge's reasoning for making the findings and did not properly have regard to each piece of evidence in the context of the totality of the evidence before reaching her conclusions – and in part of the mother's first ground – that the judge failed to point to any sufficient evidence to support her finding that the mother was the perpetrator of the injuries. In the circumstances, it is unnecessary to give any further consideration to the other grounds of appeal advanced on behalf of the mother.

74. As for the father's other grounds of appeal, based on procedural unfairness, I am unpersuaded that it would have been right to allow his appeal solely on that ground. It seems to me that Ms Cavanagh is right to say that the steps taken by the court to ensure that the father received a fair hearing, and that he had a fair opportunity to put his case, were sufficient. There is considerable force in the submission that the father disengaged from the process, and that, having indicated that he would file closing submissions, failed to do so despite being given a reasonable time to comply. In view of the clear conclusion I have reached on the outcome of the appeal, however, I do not consider it necessary to reach any definitive conclusion on this issue.

75. At the conclusion of the hearing, there was some uncertainty as to the position of the parties in the event that one or both of the appeals were allowed. We therefore directed counsel to submit supplemental submissions on that issue and are grateful to them for their prompt provision.

76. Having decided that the appeals must be allowed, the questions remaining on which we now have the benefit of supplemental submissions are as follows:

(1) Should the matter be remitted for a rehearing of the allegations concerning the injuries sustained by YW on 3 and 31 October 2019, or for a full rehearing of all the findings sought by Local Authority A?

(2) Should the matter be remitted for rehearing by the same or a different judge?

(3) Should the sixth respondent, SN, be discharged as a party?

77. The parties' respective positions can be summarised as follows. All the parties save for Local Authority A and the sixth respondent SN support a full rehearing of all the allegations before a different judge. In NA's case, it is said that, if the court is of the view that the judgment is so flawed that the matter could not be safely remitted to the first instance judge, it is very reluctantly conceded that the correct approach may be a rehearing of the case as a whole. Local Authority A argues for a limited rehearing of the allegations relating to the injuries before the same judge. The sixth respondent makes no submissions on the first and second questions. On the third question, he seeks to be discharged as a party, and his application is supported by Local Authority A and the fifth respondent SA. The other parties make no submissions on the third question.

78. On the first and second questions, Local Authority A point out that in considering the mother's application for permission to appeal I refused permission in respect of a number of the other findings, stating that they were plainly open to the judge on the evidence. Furthermore, the mother's notice of appeal did not embrace all the findings made by the judge. Accordingly the focus of the appeal was on the injuries, and Local Authority A submits that it would not be fair to set aside findings which have not been challenged on the appeal, given the inevitable constraints imposed as a result of limiting the scope of the oral hearing. It is submitted that the additional findings stand alone and are not inextricably linked to the injuries. Since the criticism levelled at the judge was that she failed to provide sufficient reasons for her findings, the right and proportionate course would be to remit the matter for limited rehearing by her. Local Authority A contends that the findings against the father also stand alone. In the event of his appeal succeeding, the local authority indicated in its supplemental submissions that it would reconsider whether to pursue the findings at any rehearing. If it decided to pursue them, the rehearing could again be entrusted to the same judge. This course would have the added benefit that the scope of the rehearing would be limited and the consequential delay in reaching final decisions about YW's future care would be reduced.

79. I acknowledge that a full rehearing is likely to cause a longer delay in concluding the proceedings. I am very conscious of the risks to YW's welfare that such a delay is likely to cause, and I have not overlooked the fact that the future of two other children is also at stake. I bear in mind s.1(2) of the Children Act. I am in no doubt, however, that the right course is to remit the matter for a full rehearing before a different judge.

80. The arguments for this course were articulated by several counsel. The most important point, articulated in particular by Ms Greenwood on behalf of the child but also by others, is that the central case advanced on behalf of the mother on the appeal was that the judge failed to provide any or any sufficient reasoning for reaching her conclusions as to the causation and perpetration of the injuries and that she failed to demonstrate

her engagement in asking the right questions. If this argument is accepted, as it has been for the reasons set out above, this amounts to a fundamental and fatal flaw that renders the whole judgment unsafe. In any event, many of the various allegations, and the evidence relating to them, are so intertwined, as is the issue of the credibility of a number of witnesses, that it would be impracticable to separate out the various allegations and the evidence on which they are founded. Given the importance of the issue of credibility in the judgment, it is inconceivable that the rehearing could be conducted by the same judge.

81. I accept all of these arguments. Although permission to appeal was confined to the grounds relating to the causation of the injuries, the hearing has demonstrated that the judgment was fundamentally flawed. In those circumstances, it would be manifestly wrong for the rehearing to be conducted by the same judge, or confined in the way proposed by Local Authority A.

82. Accordingly, if my Lords agree that this appeal should be allowed, I would remit the proceedings to the Family Liaison Judge for the Northern Circuit, MacDonald J, to be reallocated as he thinks appropriate.

83. As to the sixth respondent, there is clearly a strong argument for discharging him as a party. On balance, however, I would propose that we leave this decision to the next judge. We do not have the considered position of all of the parties, and there is further evidence about the causation of the injury sustained on 31 October which may conceivably affect his position.

LORD JUSTICE NUGEE

84. I agree.

LORD JUSTICE MOYLAN

85. I also agree.